

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the MORRIS A PERKINS TRUST.

JOHN A. PERKINS,

Plaintiff-Appellant,

v

SALLY PERKINS,

Defendant-Appellee.

UNPUBLISHED

January 18, 2007

No. 270982

Lapeer Probate Court

LC No. 02-033173-TV

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing the second of plaintiff's petitions on the basis of res judicata and the compulsory joinder rule, MCR 2.203(A). This matter arises out of a trust executed by Morris A. Perkins on his deathbed. Plaintiff is one of Morris' sons, and defendant is Morris' widow. This is the second time this case has come before this Court.¹ We hold that plaintiff's second petition is not barred by res judicata or the compulsory joinder rule. We therefore reverse and remand for further proceedings.

The background to this case is plaintiff's allegation that Morris had essentially always intended for his farm to go to whichever of his children stayed on the farm and worked on the farm. It is not disputed that plaintiff did so. After Morris' death, plaintiff and defendant acted as co-trustees under the Morris A. Perkins Trust for approximately two years. They encountered a disagreement over selling some or all of the farm, which was the only significant asset of the Trust. Defendant began to act as sole trustee. In 2002 plaintiff filed a petition with the probate court seeking to declare his status as a co-trustee and to set aside a sales contract defendant entered into in her role as trustee. The probate court found that the Trust document unambiguously provided that, defendant was not a trust beneficiary, but rather, she was the sole

¹ See *In re Morris A Perkins Trust*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2005 (Docket Nos. 256086 and 257418).

trustee with the authority to list the farm for sale. However, although the probate court entered an opinion, the probate court did not enter an order.

In 2004, plaintiff retained new counsel and allegedly came into possession of newly discovered facts. Plaintiff filed two simultaneous pleadings: (1) a motion for reconsideration of the probate court's ruling on his first petition, and (2) a second petition. In relevant part, the second petition sought to set aside the Trust in its entirety on the grounds that it had been falsely witnessed and notarized, that it was the product of fraud and undue influence by defendant, and that Morris had never been fully advised of its provisions. The second petition also sought to enforce a "contract to transfer property at death," which was essentially a long-standing and generally well-known oral promise by Morris to give the farm to whichever of his children stayed and worked on the farm. In short, the second petition sought to invalidate the sale contract and declare that plaintiff held title to the farm. The probate court construed its 2002 opinion as an order and denied reconsideration. Defendant moved for summary disposition against the 2004 petition on two grounds: (1) that all claims therein should have been brought in the 2002 petition and were now therefore barred by the compulsory joinder rule of MCR 2.203, and (2) that plaintiff's oral contract claim was not legally cognizable. The probate court agreed that the alleged oral contract was void because it had been made when plaintiff was still a minor. However, the probate court denied the remainder of defendant's motion, ruling that the compulsory joinder rule did not bar plaintiff's new claims and that there were genuine issues of material fact regarding plaintiff's undue influence and fraud claims.

In Docket No. 256086, plaintiff appealed the probate court's grant of summary disposition against his oral contract claim (from the 2004 petition). In Docket No. 257418, plaintiff appealed the probate court's order that the Trust unambiguously provided that defendant was the sole trustee (from the 2002 petition). This Court consolidated the appeals. This Court then concluded that the probate court had erred in finding defendant not a beneficiary under the Trust, so the probate court therefore erred in finding the Trust unambiguous. This Court also concluded that the contract between Morris and plaintiff was not void but merely voidable at plaintiff's discretion, although this Court declined to determine whether there was in fact an enforceable contract between them. Finally, this Court declined to consider defendant's argument that the compulsory joinder rule of MCR 2.203 should have applied. This Court remanded the case to the probate court for further proceedings. During the pendency of that first appeal, the probate court found that the sales contract was void because it had been materially breached, and the probate court entered a final order to that effect.

After remand by this Court, defendant filed new motions for summary disposition that essentially restated her earlier motions. Defendant moved for summary disposition of plaintiff's 2002 petition, again arguing that the Trust still unambiguously provided that she was the sole trustee, notwithstanding this Court's determination that she is a beneficiary. Defendant also moved for summary disposition of plaintiff's 2004 petition on the grounds that it was barred as a matter of law. The probate court found the language of the Trust patently ambiguous, therefore mandating a jury trial "to resolve the true intent of Morris Perkins regarding the issue of trustee status pursuant to the original [i.e., 2002] petition and counter petition." However, the probate court went on to opine that the entirety of plaintiff's 2004 petition was barred by res judicata and the compulsory joinder rule of MCR 2.203(A), and it granted summary disposition to defendant as to plaintiff's 2004 petition on that basis.

Plaintiff now appeals from the grant of summary disposition in defendant's favor regarding plaintiff's 2004 petition. After plaintiff filed the present claim of appeal with this Court, the probate court held a jury trial regarding whether Morris intended for defendant to be the sole trustee or for defendant and plaintiff to be joint trustees. The jury unanimously found that Morris intended plaintiff and defendant to be joint trustees, and the probate court entered an order resolving the Trust ambiguity in plaintiff's favor. Defendant apparently has not appealed that order or cross-appealed in this case, and the prior order finding the original sales contract void has also apparently not been appealed. It therefore appears that plaintiff's 2002 petition and any challenge to the sales contract have both been resolved in plaintiff's favor and are moot. The only question before us is whether plaintiff's 2004 petition was barred as a matter of law.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review de novo as a question of law the proper interpretation of a contract, including a trial court's determination whether contract language is ambiguous. *Klapp v United Ins Group Agency, Inc.*, 468 Mich 459, 463; 663 NW2d 447 (2003). Finally, we review de novo a trial court's determination whether an action is barred by res judicata. *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

The "compulsory joinder rule" is set forth in MCR 2.203(A) as follows:

Compulsory joinder. In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

Prior to June 1, 1999, this court rule provided that failure to object to improper joinder constituted a waiver of this rule by the opposing party; the 1999 amendment was largely for the purpose of "facilitat[ing] operation of the common law doctrine of res judicata." See Staff Comment To 1998 Amendment; see also *Pierson Sand and Gravel, Inc, supra* at 394 n 12 (Taylor, J., dissenting).

Significantly, and consistent with the rule's basis in the doctrine of res judicata, MCR 2.203(A) is also known as the "rule against splitting causes of actions." See *Hughes v Medical Ancillary Services, Inc*, 88 Mich App 395, 397-399; 277 NW2d 335 (1979) (discussing prior GCR 1963, 203.1, on which MCR 2.203(A) was based). The prior rule "codifie[d] Michigan's longstanding decisional rule against splitting a cause of action" and was "grounded on the same general policy considerations as the doctrine of res judicata and, to the extent the rule encompasses or mitigates res judicata, it must control." *Rogers v Colonial Federal Savings & Loan Ass'n of Grosse Pointe Woods*, 405 Mich 607, 618; 275 NW2d 499 (1979). "[S]plitting a cause of action' has been defined as litigating 'piecemeal,' i.e., in separate suits, various claims of the pleader against the opposing party arising out of the same transaction or occurrence." *Lorencz v Ford Motor Co*, 187 Mich App 63, 74; 466 NW2d 346 (1991), rev'd on other grounds 439 Mich 370 (1992). It is particularly noteworthy that the doctrine of res judicata "requires that there are two separate suits." *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262

Mich App 485, 510; 686 NW2d 770 (2004). Logically, res judicata therefore does not apply *within a single* suit. Consistent with this principle, Michigan's rule against splitting causes of action *also* applied to multiple *suits*. See *Clements v Constantine*, 344 Mich 446, 450-454; 73 NW2d 889 (1955).

The probate court rendered an opinion on plaintiff's first petition before plaintiff filed his second petition. However, the probate court did not enter an order, and the probate court did not address the specific issues raised by the second petition. Although plaintiff knew of the alleged oral agreement to give him the farm at the time of the first complaint, it is highly likely that plaintiff felt the Trust was a suitable means of effectuating that oral agreement so long as plaintiff was a co-trustee. Such a construction of the Trust would be reasonable. The attorney who drafted the Trust explained that the Trust was intended to provide income to defendant during her lifetime and then give the farm to plaintiff upon her death. The relevant documents explicitly provide that the farm would pass to plaintiff after the death of Morris and Morris' spouse, and they further explicitly provide that any real estate transaction requires the consent of all trustees. So long as plaintiff was a joint trustee, plaintiff was in a position to prevent the farm from being sold, effectively ensuring that he would eventually receive it unless he predeceased defendant or the parties mutually consented to the farm's sale.² The jury's determination that plaintiff and defendant were intended to be co-trustees has been implemented by an unappealed order. However, at the time plaintiff filed his first petition, restoring his position as co-trustee would have been the rational and logical course of action, and it would have been consistent with the alleged oral agreement. The issues in plaintiff's second petition arose as issues only because of the probate court's conclusion that defendant was the sole trustee.

Because all of these activities arise within a single suit, because the issues raised in the second petition were not actually addressed by any court before plaintiff filed it, and because the issues raised in the second petition were at least arguably made relevant only by the probate court's decision on the first petition, we conclude that the compulsory joinder rule should not be applied here.

We briefly note our disagreement with plaintiff's allegation that the probate court made impermissible findings of fact regarding his oral contract claim. Plaintiff appears to believe that this Court determined in the prior appeal that an oral contract had actually been entered into. However, this Court merely held that *if* there had been an oral agreement, it was not void because of plaintiff's status as a minor when the contract was allegedly made. We did not, and we do not now, determine whether an enforceable oral contract was actually entered into. We likewise decline to address any other of the substantive merits of plaintiff's 2004 petition. Our only holding at this time is that the 2004 petition was not barred by operation of res judicata or the compulsory joinder rule.

² However, plaintiff further alleges that defendant, in her role as trustee, has the power to invade the assets of the Trust, which is presumably why this matter did not become moot when the probate court entered the order establishing plaintiff and defendant as co-trustees. However, we decline to address any factual issues at this time.

The order dismissing plaintiff's 2004 petition is reversed, and this matter is remanded for further proceedings. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Alton T. Davis